No. _____

IN THE SUPREME COURT OF THE UNITED STATES

EMPLOYER SOLUTIONS STAFFING GROUP, LLC, ET AL.,

Petitioners,

v.

EUGENE SCALIA, SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX

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APPENDIX

TABLE OF CONTENTS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18-16493

D.C. No. 2:16-cv-02916-ROS

Eugene SCALIA, Secretary of Labor, U.S. Department of Labor,

Plaintiff-Appellee,
v.

EMPLOYER SOLUTIONS STAFFING GROUP, LLC, a limited liability company; Employer Solutions Staffing Group II, LLC, a limited liability company; Employer Solutions Staffing Group III, LLC, a limited liability company; Employer Solutions Staffing Group IV, LLC, a limited liability company,

Defendants-Appellants.

No. 18-16493

Argued and Submitted February 3, 2020
Phoenix, Arizona

Filed March 2, 2020

Appeal from the United States District Court for the District of Arizona, Roslyn O. Silver, District Judge, Presiding, D.C. No. 2:16-cv-02916-ROS

Before: Susan P. Graber, Andrew D. Hurwitz, and Eric D. Miller, Circuit Judges.

OPINION

GRABER, Circuit Judge:

Employer Solutions Staffing Group and three related companies (collectively, "ESSG")[1] appeal from the summary judgment entered in favor of the Secretary of Labor in this action challenging ESSG's failure to pay overtime to employees who worked more than 40 hours in a workweek, in violation of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201–219. ESSG also disputes the dismissal of its cross-claims against other defendants below for indemnification or contribution.

We affirm.

BACKGROUND

ESSG, a staffing company, contracts with other companies to recruit employees and place them at jobsites for which ESSG handles administrative tasks, such as payroll processing. ESSG concedes that it qualifies as an "employer" of the recruited employees under the FLSA, 29 U.S.C. § 203(d).

In 2012, ESSG contracted with Sync Staffing, which placed the recruited employees at a jobsite run by

[1] Four related companies with nearly identical names are defendants here; they usually refer to themselves using the singular "ESSG."

TBG Logistics, where the employees unloaded deliveries for a grocery store. TBG maintained a spreadsheet of the employees' hours. For each pay period in November 2012 and thereafter, TBG sent the spreadsheet to Sync, which forwarded it to ESSG.

Only one of ESSG's employees, Michaela Haluptzok, was responsible for processing the TBG payroll. ESSG trained Haluptzok on the FLSA's requirements. The first time that Haluptzok received one of the spreadsheets, she prepared and sent to Sync a report showing that employees who had worked more than 40 hours per week would receive overtime pay for those hours. But when a Sync employee called Haluptzok and told her—without explaining why this action would be appropriate—to pay all of the hours as "regular hours" instead of overtime, Haluptzok complied.

To follow the Sync employee's instructions, Haluptzok had to dismiss numerous error messages from Defendant's payroll software. Haluptzok understood that not paying overtime for the qualifying employees triggered the error messages, but she disregarded the messages anyway. After processing her first spreadsheet in this manner, Haluptzok did the same thing for every future spreadsheet. ESSG's relationship with TBG and Sync ended on July 27, 2014; by that date, more than 1,000 violations had occurred in which employees did not receive their earned overtime pay.

The Secretary sued ESSG, TBG, Sync, and another company in August 2016, more than two years after the final overtime violation occurred. ESSG

brought cross-claims for contribution or indemnification against the other defendants. The district court dismissed those claims under Federal Rule of Civil Procedure 12(b)(6). The district court also denied Defendant's motion to file a third-party complaint seeking contribution from a grocery store where some recruited employees worked. The Secretary reached consent judgments with the other companies, so only ESSG remained in the case when the Secretary moved for summary judgment. The district court granted the Secretary's motion, held that ESSG had violated the FLSA willfully, and ordered ESSG to pay approximately $78,500 in unpaid overtime wages plus an equal amount in liquidated damages.

STANDARD OF REVIEW

We review de novo a grant of summary judgment. *Flores v. City of San Gabriel*, 824 F.3d 890, 897 (9th Cir. 2016). We also review de novo "the application of legal principles to established facts." *Id.* at 905. Finally, we review de novo a dismissal under Rule 12(b)(6). *Fields v. Twitter, Inc.*, 881 F.3d 739, 743 (9th Cir. 2018).

DISCUSSION

We first address ESSG's arguments that it cannot be liable for the actions of a low-level employee such as Haluptzok and that, regardless, any FLSA violations were not willful and instead occurred in good faith.

We then discuss whether the FLSA allows a liable employer to seek indemnification or contribution from other employers.

A. *Liability*

Haluptzok knew that the relevant employees were working more than 40 hours per week without receiving overtime pay. ESSG chose Haluptzok as its agent for payroll processing, so it cannot disavow her actions merely because she lacked a specific job title or a certain level of seniority in the company. *See United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010) ("As an inanimate entity, a corporation must act through agents." (quoting *CFTC v. Weintraub*, 471 U.S. 343, 348 (1985))); *see also* Restatement (Third) of Agency § 1.01 (defining "agent" as one who "act[s] on the principal's behalf and subject to the principal's control"). Allowing ESSG to evade liability simply because none of its "supervisors" or "managers" processed the payroll would create a loophole in the FLSA and run counter to the statute's purpose of "protect[ing] all covered workers from substandard wages and oppressive working hours." *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1150 (9th Cir. 2000) (internal quotation marks omitted). Consistent with the law of agency, we impute Haluptzok's actions to ESSG. Because Haluptzok admitted that she knew the recruited employees were not being paid overtime owed to them, the district court correctly found no dispute of material fact as to ESSG's ultimate liability under the FLSA. *See Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981) ("[A]n employer who knows or should have known that an employee is or was working overtime must comply with the provisions of [29 U.S.C. §] 207[(a)].").

B. *Willfulness*

Ordinarily, a two-year statute of limitations applies to claims under the FLSA. 29 U.S.C. § 255(a). But for a "willful violation," the limitations period extends to three years. *Id.* Because the Secretary sued ESSG more than two years after the last violation, ESSG must have acted willfully for this action to be timely.

A violation is willful when "the employer either knew or showed reckless disregard for ... whether its conduct was prohibited by the [FLSA.]" *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). For more than a year, Haluptzok dismissed the payroll software's repeated warnings that employees might not be receiving earned overtime pay. Although she (at least initially) acted on Sync's instructions not to pay overtime, she never received any explanation from Sync that justified dismissing the software's error messages. Thus, through its agent, ESSG recklessly "disregarded the very possibility that it was violating the statute." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908–09 (9th Cir. 2003) (internal quotation marks omitted).[2] Accordingly, the three-year statute of limitations applies to the Secretary's claim, making this action timely.

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[2] ESSG questions whether our decision in *Alvarez* comports with the "reckless disregard" standard set forth in *Richland Shoe*. *See Flores v. City of San Gabriel*, 824 F.3d 890, 907–08 (9th. Cir. 2016) (Owens, J., concurring). Of course, we are not free to revisit *Alvarez*. *See Miller v. Gammie*, 335 F.3d 889, 892–93 (9th Cir. 2003) (en banc). In any event, based on Haluptzok's admissions, we have little trouble concluding that ESSG recklessly disregarded its obligations under the FSLA even under the strictest reading of *Richland Shoe*.

C. *Liquidated Damages*

The FLSA mandates liquidated damages in an amount equal to the unpaid overtime compensation unless an employer acted in "good faith" and had "reasonable grounds" to believe that it was not violating the FLSA. 29 U.S.C. §§ 216(b), 260. Because ESSG's violations were willful, it could not have acted in good faith. *See Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 920 (9th Cir. 2003) ("[A] finding of good faith is plainly inconsistent with a finding of willfulness.").

ESSG insists that an employer can act in good faith while willfully violating the FLSA. But, as a three-judge panel we cannot overrule *Chao* in the absence of intervening en banc or Supreme Court precedent. *Miller v. Gammie*, 335 F.3d 889, 892–93 (9th Cir. 2003) (en banc). Indeed, *Chao* aligns with precedent in most other circuits that have reached the issue. *See Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1166 (11th Cir. 2008) (agreeing with *Chao*, joining "the majority side of the circuit split on this issue," and collecting cases). Thus, we affirm the award of liquidated damages.

D. *Indemnification/Contribution*

The FLSA's text does not expressly address whether an employer may seek indemnification or contribution from another employer, but ESSG contends that the statute implicitly permits those remedies. Alternatively, ESSG asks us to recognize those remedies under federal common law.

1. *Whether the FLSA Implicitly Allows Indemnification or Contribution*

"In determining whether a federal statute that does not expressly provide for a particular private right of action nonetheless implicitly created that right, our task is one of statutory construction." *Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 91 (1981). We must ascertain "whether Congress intended to create the private remedy—for example, a right to contribution—that the [litigant] seeks to invoke." *Id.* In recent decades, the Supreme Court has adopted a "cautious course before finding implied causes of action." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). Four factors guide our inquiry: (1) the statute's text; (2) "the underlying purpose and structure of the statutory scheme"; (3) "the likelihood that Congress intended to supersede or to supplement existing state remedies"; and (4) the statute's legislative history. *Nw. Airlines*, 451 U.S. at 91; *accord Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981).

ESSG largely ignores the relevant factors and argues that, because employers face joint and several liability under the FLSA, they necessarily must have a right to seek contribution from one another. Defendant emphasizes 29 C.F.R. § 791.2 (2019), which provides that "all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act." A newer, not-yet-effective version of this regulation refers expressly to joint and several liability: "[A] joint employer is jointly and severally liable with ... any other joint employers for

compliance with all of the applicable provisions of the Act." *Id.* (2020).[3] Of course, the regulation does not clarify what Congress intended when it enacted the FLSA in 1938; it provides only the Secretary's current interpretation of the FLSA.

But the Supreme Court has rejected the argument that joint and several liability always goes hand-in-hand with contribution. *See Tex. Indus.*, 451 U.S. at 646 ("Nor does the judicial determination that defendants should be jointly and severally liable suggest that courts also may order contribution, since joint and several liability simply ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants."). And the common law "provided no right to contribution among joint tortfeasors." *Id.* at 634. ESSG does not merely owe a debt to its employees; it committed a wrong against them. Thus, we remain unpersuaded that Congress necessarily codified a right to contribution when it enacted the FLSA.

We turn now to the four factors. The Second Circuit, applying the four-factor framework from *Northwest Airlines*, has held that the FLSA does not provide a right to contribution or indemnification for liable employers. *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 144 (2d Cir. 1999). We agree.

First, the FLSA's text says nothing about a right to contribution or indemnification for employers who have violated the statute. That silence "is not dispositive if, among other things," the statute's text suggests that

[3] The newer version takes effect on March 16, 2020.

it was "enacted for the special benefit of a class of which [ESSG] is a member." *Nw. Airlines*, 451 U.S. at 91–92. 1571. But, the FLSA's text suggests exactly the opposite. *See* 29 U.S.C. § 202 (noting the congressional policy behind the FLSA of eliminating "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers").

Second, as its text suggests, the FLSA's "central purpose" is to "enact minimum wage and maximum hour provisions designed to protect employees," not employers. *Williamson*, 208 F.3d at 1154; *see also Herman*, 172 F.3d at 144 (stating that the FLSA "was designed to regulate the conduct of employers for the benefit of employees"). In other words, ESSG belongs to the class whose conduct Congress intended to control "for the protection and benefit *of an entirely distinct class*." *Tex. Indus.*, 451 U.S. at 639 (quoting *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 37 (1977)). The FLSA's statutory scheme resembles those of the Equal Pay Act and Title VII of the Civil Rights Act, for which *Northwest Airlines* found no implied right to contribution for employers. Similarly, the FLSA "has a comprehensive remedial scheme as shown by the 'express provision for private enforcement in certain carefully defined circumstances,' " *Herman*, 172 F.3d at 144 (quoting *Nw. Airlines*, 451 U.S. at 93), and for enforcement by the federal government in other circumstances, 29 U.S.C. § 217. Indeed, "broader or more comprehensive coverage of employees ... would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945).

Third, "[t]he comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies" beyond those expressly allowed under the statute. *Nw. Airlines*, 451 U.S. at 93–94. The FLSA provides "comprehensive statutory remedies," *Williamson*, 208 F.3d at 1155, and it is "not within our competence as federal judges to amend ... comprehensive enforcement schemes" by adding private remedies that Congress never intended to allow, *Nw. Airlines*, 451 U.S. at 94.

Fourth, and finally, the FLSA's legislative history is "silent on a right to contribution or indemnification" for employers. *Herman*, 172 F.3d at 144 (collecting the relevant legislative history). In sum, we see no indication that Congress intended to create a right to contribution or indemnification for employers under the FLSA.

ESSG argues that allowing it to seek contribution or indemnification from other employers would advance the FLSA's purpose in various ways, including by encouraging employers to be more proactive about complying with the statute. Maybe so, but such policy questions belong to "Congress, not the courts, to resolve." *Tex. Indus.*, 451 U.S. at 646. "If the statute itself does not 'display an intent' to create 'a private remedy,' then 'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.' " *Ziglar*, 137 S. Ct. at 1856 (brackets omitted) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001)). Following the Supreme Court's "cautious course," *id.* at

1855, we decline to find an implied cause of action for contribution or indemnification under the FLSA.

2. *Whether a Right to Contribution or Indemnification Arises Under Federal Common Law*

Federal courts have the authority to craft federal common law in limited circumstances. First, we may undertake this type of lawmaking "in those few instances where 'a federal rule of decision is necessary to protect [a] uniquely federal interest.' " *Mortgs., Inc. v. U.S. Dist. Court*, 934 F.2d 209, 213 (9th Cir. 1991) (per curiam) (quoting *Tex. Indus.*, 451 U.S. at 640). "The right of recovery from another wrongdoer, however, does not implicate any such interests." *Id.* Thus, this category does not help ESSG.

Similarly, we may create federal common law "in those areas dominated by strong national or federal concerns such as controversies between states, admiralty matters, or foreign relations." *Id.* Plainly, this category does not apply here.

Finally, "Congress may empower federal courts to make federal common law when a statute contains sweeping language and its legislative history indicates Congress's expectation that the courts will 'give shape to the statute's broad mandate by drawing on common-law tradition.' " *Id.* (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978)). In *National Society of Professional Engineers*, for example, the Court addressed the Sherman Act, for which "[t]he legislative history makes it perfectly clear that [Congress] expected

the courts to give shape" to the statute's broad contours. 435 U.S. at 688. By contrast, neither the FLSA's text nor its legislative history suggests that Congress expected the courts to go beyond the "judicial interpretation of ambiguous or incomplete provisions" that proves necessary for "almost any statutory scheme." *Nw. Airlines*, 451 U.S. at 97.

When "Congress has enacted a comprehensive legislative scheme" that includes "integrated procedures for enforcement," we presume that Congress did not intend for us "to supplement the remedies enacted." *Mortgs.*, 934 F.2d at 213. The FLSA is just such a comprehensive statute. It includes procedures for both "private enforcement in certain carefully defined circumstances," *Herman*, 172 F.3d at 144 (internal quotation marks omitted), and (as in this case) enforcement by the Secretary, § 217. Thus, this final category also does not help ESSG.

We thus join the Second Circuit in holding that the FLSA does not imply a right to contribution or indemnification for liable employers. We also decline to make new federal common law that recognizes those rights.

AFFIRMED.

Case: 18-16493, 04/14/2020, DktEntry: 59

FILED APR 14, 2020

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS

No. 18-16493

D.C. No. 2:16-cv-02916-ROS

District of Arizona, Phoenix

ORDER

Before: GRABER, HURWITZ, and MILLER, Circuit Judges.

The panel has voted to deny Appellants' petition for panel rehearing.

The full court has been advised of Appellants' petition for rehearing *en banc*, and no judge of the court has requested a vote on it.

Appellants' petition for panel rehearing and rehearing *en banc*, Docket No. 58, is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

R. Alexander Acosta,
Plaintiff,
v.
TBG Logistics LLC, et al.,
Defendants.

No. CV-16-02916-PHX-ROS

JUDGMENT

Pursuant to the Court's Granting the Plaintiff's Motion for Summary Judgment:

1. JUDGMENT IS HEREBY ENTERED AND IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that, pursuant to Section 17 of the Act (29 U.S.C. §217), Defendants Employer Solutions Staffing Group, LLC, Employer Solutions Staffing Group II, LLC, Employer Solutions Staffing Group III, LLC, Employer Solutions Staffing Group IV, LLC their officers, agents, servants, employees, and all persons acting in their behalf and interest (collectively, "ESSG"); hereby are permanently enjoined and restrained from violating the provisions of the Act in any of the following manners:

a. ESSG shall not, contrary to FLSA sections 7 and 15(a)(2), employ any employee who in any workweek is engaged in commerce, within the meaning of the FLSA, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of FLSA § 3(s), for any workweek longer than

40 hours unless such employee receives compensation for his or her employment in excess of 40 hours in such workweek at a rate not less than one and one-half times the regular rate at which he or she is employed.

b. ESSG shall not continue to withhold the amount of $78,518.28, representing overtime wages due under Section 17 of the FLSA (29 U.S.C. §217).

2. FURTHER, JUDGMENT IS HEREBY ENTERED, pursuant to Section 16 of the Act (29 U.S.C. § 216), against ESSG in the total amount of $157,036.56. This sum represents the unpaid overtime wages referenced above, and an equal amount in liquidated damages. Accordingly:

a. Within 30 days of the date of this Judgment, ESSG shall pay to Plaintiff the sum of $78,518.28 which represents the unpaid overtime wages hereby found to be due, for the period from August 30, 2013 to July 27, 2014 ("Subject Period"), to the employees named in Exhibit A, attached hereto and made a part hereof ("Exhibit A"), in the amounts set forth therein.

b. Within 30 days of the date of this Judgment, ESSG shall further pay to Plaintiff as liquidated damages the additional sum of $78,518.28 hereby found to be due, for the Subject Period, to the employees named in Exhibit A, in the amounts set forth therein.

c. The monetary provisions of this Judgment shall be deemed satisfied upon Defendants' delivery to District Director Eric Murray, US Dept. of Labor, Wage & Hour

Division, 230 N. First Avenue, Suite 402, Phoenix, Arizona 85003 of the following:

i. A certified check or cashier's check in the amount of $78,518.28 made payable to the order of the "Wage and Hour Div., Labor" and referencing "ESSG BW" on the face of the check; and,

ii. A certified check or cashier's check in the amount of $78,518.28 made payable to the order of the "Wage and Hour Div., Labor" and referencing "ESSG LDs" on the face of the check.

3. Plaintiff shall distribute the proceeds from the checks referred to in paragraph 2(c)(i)-(ii) to the persons named in Exhibit A, or to their estates, if that be necessary. Any amounts of unpaid overtime wage or liquidated damages not so paid within a period of three (3) years from the date of receipt thereof shall, pursuant to Section 16(c) of the Act (29 U.S.C. § 216(c)), be deposited into the Treasury of the United States as miscellaneous receipts.

4. Plaintiff shall recover from ESSG post-judgment interest at the statutory rate.

5. This Court shall retain jurisdiction of this action for purposes of enforcing compliance with the terms of this Judgment.

6. The Clerk of Court shall close this case.

Dated this 9th day of July, 2018.
Honorable Roslyn O. Silver
Senior United States District Judge

[Listing of Named Individuals Represent by the Secretary of Labor and Amounts of Individual Monetary Judgment Awards Omitted]

United States District Court, D. Arizona

R. Alexander ACOSTA,[4] Plaintiff,
v.
TBG LOGISTICS LLC, et al., Defendants.

No. CV-16-02916-PHX-ROS

Signed 06/27/2018

ORDER

Honorable Roslyn O. Silver, Senior United States District Judge

Defendant ESSG's payroll processing employee knew that, from August 2013 to July 2014, other ESSG employees were working more than 40 hours per week but not receiving overtime pay. The Secretary of Labor ("Plaintiff") now moves for summary judgment, arguing ESSG engaged in repeated "willful violation[s]" of the Fair Labor Standards Act ("FLSA"). ESSG contends its undisputed violations of the FLSA cannot qualify as "willful" because it is a very large company that cannot be expected to always comply with the FLSA. Moreover, the relevant violations allegedly were the result of negligence by an "entry level employee." Neither ESSG's size nor the position of the payroll employee preclude a finding of willfulness. And given that there are no

[4] In April 2017, R. Alexander Acosta became the Secretary of Labor. He is substituted as the named plaintiff. See Fed. R. Civ. P. 25(d).

disputed facts regarding what happened, Plaintiff's motion will be granted.

BACKGROUND

The relevant facts are undisputed. Defendant ESSG[5] is a "staffing company" that "recruit[s], place[s], and assign[s]" people to work at various jobsites. ESSG often enters into contracts with other companies requiring those other companies "do the recruiting, placing, and assigning" of employees while ESSG will handle administrative matters, such as payroll processing.

As relevant here, ESSG entered into a contract with an entity known as Sync Staffing whereby Sync Staffing located individuals to work at a jobsite run by yet another company named TBG Logistics. At that jobsite, employees worked under the direction of TBG Logistics in unloading tractor trailers delivering grocery store products. Despite not having direct contact with the employees performing the work, ESSG concedes it was an "employer" under the FLSA.

TBG Logistics, Sync Staffing, and ESSG worked together to track the hours each employee worked and the amount of pay each employee would receive. TBG

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[5] The parties use "ESSG" to refer to four defendants: Employer Solutions Staffing Group, LLC; Employer Solutions Staffing Group II, LLC; Employer Solutions Staffing Group III, LLC; and Employer Solutions Staffing Group IV, LLC. The parties do not differentiate between these entities and the Court will assume there are no important distinctions. Thus, the Court will follow the parties' lead and refer simply to "ESSG."

Logistics kept a spreadsheet showing the number of hours each employee worked and how those hours should be paid, *i.e.* at the regular rate or at the increased rate for overtime. Each pay period, TBG Logistics sent that spreadsheet to Sync Staffing. Sync Staffing then forwarded the spreadsheet to ESSG. Once ESSG received the spreadsheet, an ESSG employee named Michaela Haluptzok ("Haluptzok") processed the payroll and issued the paychecks.

In early November 2012, TBG Logistics sent the first payroll spreadsheet to Sync Staffing. That spreadsheet reflected many employees worked more than 40 hours in a week but it stated all the hours should be paid at the regular rate. Sync Staffing then sent the spreadsheet to Haluptzok. Once she received the information, Haluptzok prepared a preliminary draft indicating how each employee would be paid. Because many employees had worked more than 40 hours per week, the preliminary draft reflected those employees receiving 1.5 times their regular hourly wage for all hours worked in excess of 40.

Haluptzok sent the draft to Sync Staffing but a Sync Staffing employee called and told Haluptzok to process the payroll exactly as specified by TBG Logistics. That is, all hours should be paid "as straight time regular hours," *i.e.* no overtime. (Doc. 103-2 at 3). Haluptzok "did not receive details" from Sync Staffing why processing the payroll in that manner would be appropriate. (Doc. 103-2 at 3). In fact, Haluptzok had no "understanding of what type of work ESSG employees were ... performing at TBG Logistics" and she did not ask her superiors for guidance. (Doc. 103 at 13). Instead

of questioning the legality of Sync Staffing's instructions, Haluptzok processed the payroll without paying any overtime.

When processing the payroll as Sync Staffing instructed, Haluptzok had to dismiss error messages generated by ESSG's software program. Those error messages indicated the employees who worked more than 40 hours per week might not be receiving "compensat[ion] at the proper rate." (Doc. 98 at 4). Having dismissed the error messages, the employees were paid without any overtime premium.

Haluptzok processed the payroll for the employees in the same manner during the following months. Between August 30, 2013, and July 27, 2014, there were "1103 instances where employees were not paid overtime for hours over 40 in a week, an average of 22 violations per week." (Doc. 98 at 5). In processing the payroll for those workweeks, Haluptzok had to repeatedly dismiss the error messages generated by the software indicating the pay might not be correct. The total amount of unpaid overtime during that period was $78,518.28. (Doc. 98 at 5). ESSG's relationship with Sync Staffing and TBG Logistics ended on July 27, 2014.

Plaintiff filed the present suit on August 30, 2016. The suit originally named as defendants ESSG, TBG Logistics, Sync Staffing, and a few individuals. The complaint alleged all the defendants had violated the FLSA by failing to pay overtime. The only defendant still contesting liability is ESSG. Plaintiff now seeks summary judgment on its claim that ESSG's behavior constituted "willful" violations of the FLSA. ESSG

opposes that motion, claiming it is a large company that usually complies with the FLSA. ESSG's size, together with the fact that Haluptzok was a low-level employee, allegedly means there is at least a dispute of fact whether its behavior was "willful."

ANALYSIS

The FLSA provides for a two-year statute of limitations "except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. § 255(a). ESSG's relationship with TBG Logistics and Sync Staffing ended on July 27, 2014, and this suit was not filed until August 30, 2016. Thus, ESSG's liability turns entirely on whether its violations of the FLSA were "willful" such that the three-year limitations period applies.

In 1988, the Supreme Court held "willful" in the context of the FLSA refers "to conduct that is not merely negligent." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). In the Supreme Court's view, an employer does not act "willfully" if it merely knew "the FLSA was in the picture." *Id.* Rather, an employer acts "willfully" if it "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Id.* After that decision, the Ninth Circuit has repeatedly addressed the type of behavior that can qualify as "willful." Those decisions have adopted a relatively broad view of what will qualify as an employer engaging in "reckless disregard" of its obligations.

As outlined by the Ninth Circuit, "willful" behavior does not require "an employer ... knowingly

have violated the FLSA." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908 (9th Cir. 2003). Instead, an employer acts willfully when it "disregard[s] the very possibility that it [is] violating the statute." *Id.* at 908–09.

Thus, an employer may act with reckless disregard if the employer was "on notice of its FLSA requirements, yet [took] no affirmative action to assure compliance with them." *Flores v. City of San Gabriel*, 824 F.3d 890, 906 (9th Cir. 2016). The underlying facts in *Flores* are helpful for determining whether ESSG's behavior should be deemed willful.

In *Flores*, the employer "was aware of its obligations under the FLSA" but the record contained "no evidence of affirmative action taken by the [employer] to ensure that its [compensation practices] complied with the FLSA." *Id.* It was "undisputed" the employer had "failed to investigate whether its [compensation scheme] complied with the FLSA at any time following" the initial adoption of that scheme. *Id.* In fact, the employer "put forth no evidence of any actions it took to determine whether its [compensation scheme] complied with the FLSA, despite full awareness of its obligation to do so under the Act." *Id.* Based on those facts, the employer's behavior qualified as "willful."

Like the employer in *Flores*, it is undisputed ESSG was aware of its obligations under the FLSA. It is also undisputed ESSG—through its designated agent Haluptzok—received information that its employees were working more than 40 hours. Despite that knowledge, ESSG processed the payroll without conducting *any* investigation into whether the employees

were entitled to overtime. Using the language of *Flores*, ESSG "was aware of its obligations under the FLSA," knew the employees were working more than 40 hours, but took no "affirmative action ... to ensure" the payroll processing was correct. *Id.* In these circumstances, ESSG willfully violated the FLSA as a matter of law.

ESSG disagrees with this conclusion and offers a variety of unusual legal arguments why there is at least a question of fact regarding its alleged willfulness. Those legal arguments revolve around ESSG's size and its contention that it cannot be responsible for Haluptzok's knowledge and actions. As briefly explored below, ESSG's arguments have no merit.

ESSG first claims it could not have acted willfully because it is a large company, processing a large number of payroll transactions, and it only violated the FLSA a handful of times. According to a self-conducted audit of its payroll transactions, ESSG violated the FLSA in only 0.3% of all payroll transactions during the time period. (Doc. 102 at 10). Given that purported record of compliance, ESSG believes "[i]t would be extremely impractical to require a company ... to conduct a companywide audit on a whim to look for a problem that didn't exist and which it did not even suspect existed." (Doc. 102 at 11). This argument is not entirely coherent but to the extent the Court can understand it, ESSG misunderstands how the FLSA operates.

The incoherent portion of this argument is ESSG's assertion that it would be "impractical" to require it "to look for a problem that didn't exist." It is undisputed that ESSG did not pay overtime owed to its employees. Thus, to the extent ESSG is arguing an audit would

have been "impractical" because it would not have uncovered violations, the facts of this case prove otherwise.

The coherent portion of this argument is ESSG's belief that it would be "impractical" for a large company to pay every employee in the manner required by the FLSA. The statute, however, does not contain an exemption for large employers. That is, an employer must comply with the FLSA no matter how large it is or how many payroll transactions it processes. And while a large employer might commit some FLSA violations unknowingly—such as through typographical errors—that is not the type of errors committed here. In this case, Haluptzok repeatedly processed payroll information where employees had worked more than 40 hours. Haluptzok had no reason to believe those employees were exempt from the FLSA's overtime provisions but she processed the payroll without overtime pay. Such knowing violations of the FLSA cannot be deemed non-willful merely because ESSG is a large employer.

ESSG next claims it did not behave willfully because it delegated its FLSA compliance obligations to Haluptzok, a low-level employee, and high-ranking employees never learned of the violations. ESSG offers no authority recognizing this as a plausible basis for an employer to avoid FLSA liability. And to the extent relevant authority exists, it is contrary to ESSG's position.

ESSG appears to believe an employer can commit a willful violation of the FLSA only if the relevant action

was taken by an individual carrying the formal title of "manager" or "supervisor." ESSG offers no authority in support of this position and the Court has been unable to find any case adopting such an approach. The lack of applicable authority is not surprising because ESSG's position would create a very strange incentive for employers. Under ESSG's argument, an employer could insulate itself from FLSA liability for willful violations by delegating its payroll practices to low-level employees. If an employer ensured no high-ranking employees were involved in payroll processing, FLSA violations would never qualify as "willful." The FLSA was not meant to incentivize employers in this manner. *Cf. Parth v. Pomona Valley Hosp. Med. Ctr.*, 630 F.3d 794, 799 (9th Cir. 2010) ("Congress's purpose in enacting the FLSA was to protect all covered workers from substandard wages and oppressive working hours.").

In a related argument, ESSG contends FLSA violations committed by a low-level employee should not be imputed to the employer. Again, ESSG provides no authority indicating an employee's rank within an organization is the crucial inquiry. Rather, the relevant inquiry is whether a particular employee was the individual responsible for making pay decisions or ensuring FLSA compliance. As noted by other courts, an employer that delegates FLSA compliance to a particular employee must be held responsible for that employee's actions. *See Chao v. Barbeque Ventures, LLC*, 547 F.3d 938, 943 (8th Cir. 2008) (quoting cases). To hold otherwise would "nullify the [FLSA]." *Id.*

Here, ESSG structured its business such that Haluptzok was the sole individual responsible for

receiving time records, processing those records, and deciding whether employees should be paid overtime. ESSG effectively delegated all of its FLSA compliance to Haluptzok. Regardless of Haluptzok's position in ESSG's hierarchy, she was the only individual who could possibly act on behalf of ESSG regarding overtime decisions. In such circumstances, Haluptzok's knowledge and behavior must be imputed to ESSG.

Finally, ESSG presents an argument regarding the "collective scienter doctrine." (Doc. 102 at 7). It is unclear what, precisely, ESSG has in mind with this argument but it appears to be another way of asserting Haluptzok's knowledge should not be imputed to ESSG. As far as the Court can tell, however, no federal decision has ever used the "collective scienter" doctrine in a case involving the FLSA. The doctrine usually appears in securities fraud class actions. *See, e.g.*, *Glazer Capital Mgmt., LP v. Magistri*, 549 F.3d 736, 743 (9th Cir. 2008). ESSG offers no explanation why the doctrine should be imported into the FLSA context and the Court cannot conceive of one.

Neither ESSG's size nor its decision to delegate FLSA compliance to Haluptzok prevents a finding of willfulness. The undisputed facts are that Haluptzok knew employees were working more than 40 hours but not being paid overtime. Haluptzok made no effort to determine whether that was lawful and the illegal behavior continued for more than a year, with Haluptzok repeatedly dismissing warnings that such pay violated the FLSA. Under these facts, ESSG willfully violated the FLSA. Thus, the three-year statute of limitations

applies. Plaintiff will be directed to submit a form of judgment to be entered against ESSG.

Accordingly,

IT IS ORDERED the Motion for Summary Judgment (Doc. 97) is **GRANTED**.

IT IS FURTHER ORDERED no later than **July 6, 2018**, Plaintiff shall submit a proposed form of judgment containing the exact amount of judgment to be entered against ESSG.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Thomas E Perez, et al.,
Plaintiffs,
v.
TBG Logistics LLC, et al.,
Defendants.

No. CV-16-02916-PHX-ROS

ORDER

The Court, having reviewed the stipulation of the parties regarding dismissal of New Way Staffing, LLC dba Sync Staffing and Daniela Rodriguez, and good cause appearing,

IT IS ORDERED the stipulation (Doc. 92) is **GRANTED.** Defendants New Way Staffing, LLC dba Sync Staffing and Daniela Rodriguez are hereby dismissed with prejudice from this action.

This dismissal is limited to New Way Staffing, LLC dba Sync Staffing and Daniela Rodriguez only, and the action against the remaining defendants continues.

Plaintiff and Defendants New Way Staffing, LLC and Daniela Rodriguez shall bear his, her or its own fees and other expenses incurred by such party in connection with

any stage of this proceeding, including but not limited to attorneys' fees, which may be available under the Equal Access to Justice Act, as amended.

Dated this 25th day of September, 2017.

/s/ Honorable Roslyn O. Silver
Senior United States District Judge

United States District Court, D. Arizona

Thomas E PEREZ, Plaintiff,
v.
TBG LOGISTICS LLC, et al., Defendants.

No. CV-16-02916-PHX-ROS

Signed 12/16/2016

ORDER

Honorable Roslyn O. Silver, Senior United States District Judge

The Secretary of Labor has sued a large group of entities and one individual for violating the Fair Labor Standards Act ("FLSA").

Defendant Employer Solutions Staffing Group, LLC, and its related entities (collectively "ESSG"), filed cross-claims for indemnification or contribution against most of the other defendants. The Ninth Circuit has not addressed whether such cross-claims are allowed under the FLSA but other circuits have concluded they are not. Based on that authority, the cross-claims will be dismissed.

BACKGROUND

According to the Secretary of Labor's complaint, Defendant TBG Logistics LLC ("TBG") employs workers to unload tractor trailers containing groceries. (Doc. 39

at 5). Defendant Matthew Connors is the "managing agent" of TBG. In early 2013, TBG entered into an agreement with Defendants Sync Staffing and ESSG. Under that agreement, Sync Staffing and ESSG provided employees to TBG to perform the work of unloading groceries. The employees received paychecks from ESSG and were under the control of ESSG but were also under the control and supervision of TBG, Connors, and Sync Staffing.

In July or August 2014, Sync Staffing decided to replace ESSG with Defendant Countrywide Payroll & HR Solutions, Inc. ("Countrywide"). After ESSG was replaced, the employees received their paychecks from Countrywide and were subject to the control of Countrywide. The employees' daily tasks, however, did not change and they remained subject to the "supervision and control" of TBG, Connors, and Sync Staffing.

The Secretary of Labor alleges the "economic realities of the employment relationship" show that, regardless of who was ostensibly identified as the employer, TBG, ESSG, Connors, Sync Staffing, and Countrywide all qualified as an "employer" under the FLSA. (Doc. 39 at 7). The Secretary of Labor has named these entities and Connors as defendants in this case, alleging that from 2013 to the present the defendants required the employees work more than forty hours in a workweek but failed to pay the employees an overtime premium for the hours worked over forty. Based on this, the Secretary of Labor seeks a permanent injunction requiring the defendants comply with the FLSA as well as damages in the amount of the unpaid overtime. The

Secretary of Labor asserts all the defendants should be held "jointly and severally liable." (Doc. 39 at 7).

In responding to the complaint, ESSG asserted cross-claims seeking "indemnification and/or contribution" from TBG, Connors, and Sync Staffing. (Doc. 40 at 10). The four cross-claims consist of a claim for indemnification under the FLSA, a claim for contribution under the FLSA, a claim for indemnification and contribution under federal common law, and a claim for "contractual indemnity and/or contribution."

The first three cross-claims are brought against TBG, Connors, and Sync Staffing but the contractual indemnity cross-claim is brought solely against Sync Staffing. All three cross-defendants moved to dismiss, arguing the cross-claims are not supported by sufficient facts and, even if they were, the underlying legal theories are not authorized by federal law.

ANALYSIS

Instead of discussing cross-defendants' argument that the cross-claims are not supported by sufficient factual allegations, it is more efficient to determine if the underlying legal theories are viable. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) ("Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory."). If the underlying legal theories are not viable, there is no need to grant leave to amend. *AE ex rel. Hernandez v. Cty. of Tulare*, 666 F.3d

631, 636 (9th Cir. 2012) (leave to amend need not be given if it would be futile).

ESSG's cross-claims fall into three categories. The first category covers ESSG's cross-claims for either indemnity or contribution under the FLSA. The second category covers ESSG's cross-claim for indemnity or contribution under federal common law. And the third category covers ESSG's cross-claim for contractual indemnity. ESSG has agreed the claims in the first category are not viable and must be dismissed.[6] Therefore, the Court need only resolve whether the federal common law and contractual indemnity cross-claims are viable.

I. Federal Common Law Does not Authorize Indemnity or Contribution

When a federal statute does not explicitly or implicitly authorize a claim for indemnification or contribution, such a claim may still exist "via the power of the courts to formulate federal common law." *Mortgages, Inc. v. U.S. Dist. Court for Dist. of Nev.*, 934 F.2d 209, 212 (9th Cir. 1991). Relying on this, ESSG argues the Court should formulate a common law entitlement to indemnification or contribution between FLSA defendants. But the power to fashion federal common law is very limited. *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95 (1981).

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[6] ESSG states "[e]veryone agrees that the FLSA does not speak directly or indirectly to the particular question of remedies between or among co-defendants...." (Doc. 51 at 7).

The power is limited to "those few instances where a federal rule of decision is necessary to protect uniquely federal interest[s]." *Mortgages*, 934 F.2d at 213 (quotation marks and citation omitted). The Supreme Court has held a desire for contribution among violators of a federal statute "does not implicate uniquely federal interests of the kind that oblige courts to formulate federal common law." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642 (1981). The Ninth Circuit has interpreted that statement to mean "[t]he right of recovery from another wrongdoer"—whether contribution or indemnification—does not present a situation where courts should formulate federal common law. *Mortgages*, 934 F.2d at 213. Therefore, federal common law does not authorize ESSG's claims for contribution or indemnification under the FLSA.

ESSG disagrees with this analysis and offers its own views of when courts should formulate federal common law. ESSG provides a lengthy discussion of common law principles, focusing on cases and treatises from the 19th Century. (Doc. 51 at 10-12). ESSG goes so far as to claim the Supreme Court's decision in "*Texas Industries* was wrongly decided" and should be limited as applying only to the federal antitrust statutes at issue in that case. (Doc. 51 at 17). But the Ninth Circuit has not limited *Texas Industries* to the antitrust context. *See Mortgages*, 934 F.2d at 213 (no right to indemnification or contribution under the False Claims Act); *United States v. Guillen-Cervantes*, 748 F.3d 870, 875 (9th Cir. 2014) (no right to contribution under federal immigration laws). And ESSG offers no reason to believe the Ninth Circuit, having extended *Texas Industries* to other federal statutes, would ignore it in the FLSA

context. The Ninth Circuit has held the potential need for one wrongdoer "to recover from another wrongdoer" does not present an appropriate situation for formulation of a federal common law remedy. *Mortgages*, 934 F.2d at 213. Following that ruling, ESSG's federal common law cross-claim will be dismissed.

II. Claim for Contractual Indemnity is Preempted

ESSG's only remaining cross-claim is for contractual indemnity and it is asserted against one defendant, Sync Staffing. According to the cross-complaint, ESSG entered into an agreement with Sync Staffing which contained a provision stating Sync Staffing would "indemnify, defend and hold harmless [ESSG] ... from any and all ... claims for damages of any nature whatsoever" including "violations of wage and hours laws," such as the FLSA. (Doc. 40-1 at 3). ESSG alleges any liability to the Secretary of Labor in this case will be the result of "wrongful acts or omissions of Sync Staffing." Thus, ESSG believes the contractual provision entitles it to indemnification from Sync Staffing. (Doc. 40 at 14). Sync Staffing has moved to dismiss, arguing the contractual indemnity provision is against public policy. (Doc. 47 at 10). Sync Staffing is correct.

The strong majority of courts to address the issue have concluded the type of contractual indemnity provision at issue here is not enforceable. Courts describe such provisions as against public policy or, alternatively, as preempted by federal law. *See, e.g.*, *McDougal v. G & S Tobacco Dealers, L.L.C.*, 712 F. Supp. 2d 488, 497 (N.D.W. Va. 2010) (discussing cases and finding state-law cross-claims "preempted" and

against "public policy"). Regardless of the exact label courts apply when dismissing such claims, the end result is always the same: any attempt by a defendant to shift its liability to another entity or individual is found unenforceable.

The Ninth Circuit has not addressed indemnification claims under the FLSA but the Second Circuit has. In that case, one co-employer was attempting to assert a state-law cross-claim for indemnification against another co-employer. The Second Circuit summarily concluded that cross-claim was preempted by federal law. *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 144 (2d Cir. 1999). In doing so, the Second Circuit cited to cases from the Fourth, Fifth, and Tenth Circuits. Those cases involved slightly different situations of an FLSA defendant seeking indemnity from an employee. *Id.* An employer seeking indemnification from an employee raises unique concerns about frustrating the intent of the FLSA. *LeCompte v. Chrysler Credit Corp.*, 780 F.2d 1260, 1264 (5th Cir. 1986) (allowing indemnity claim against employees "would deprive them of overtime compensation to which the [FLSA] otherwise entitles them"). But the Second Circuit apparently did not find this distinction noteworthy.[7] And the underlying rationale of the decisions, whether involving cross-claims against co-employers or employees, is that courts should

[7] Outside the context of the FLSA, courts have recognized contractual indemnity cross-claims may be preempted. *See Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597 (4th Cir. 2010) (cross-claims for contractual indemnity were preempted by Americans with Disabilities Act and Fair Housing Act).

"foster a climate in which compliance with the substantive provisions of [the FLSA will] be enhanced." *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1408 (10th Cir. 1992).

ESSG offers no convincing reason to believe the Ninth Circuit would disagree with the approach taken in other circuits. The Ninth Circuit has already adopted such an approach in the context of litigation under the False Claims Act. *Cell Therapeutics, Inc. v. Lash Grp., Inc.*, 586 F.3d 1204, 1208 (9th Cir. 2009) (recognizing contractual indemnity cross-claims are not permitted under the False Claims Act). That approach is justified by a desire to avoid weakening the False Claims Act. *See U.S. ex rel. Madden v. Gen. Dynamics Corp.*, 4 F.3d 827, 830 (9th Cir. 1993) (defendant should not be given "opportunity to offset its liability"). The same logic applies here. Allowing ESSG's state-law contractual indemnity claim would have the practical effect of allowing it to offset FLSA liability and thereby weaken its incentive to comply with the FLSA. The contractual indemnity cross-claim is either against public policy or preempted by federal law.[8]

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[8] Sync Staffing requests the Court enter a Rule 54(b) judgment on the cross-claims. Such judgments are meant to be the exception, not the rule. *See Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 10 (1980). This case is not complicated and there is no reason to complicate it by entering a final judgment regarding a single piece and, potentially, allowing a piecemeal appeal. *Wood v. GCC Bend, LLC*, 422 F.3d 873, 879 (9th Cir. 2005). Therefore, the request for a Rule 54(b) judgment will be denied.

III. Sync Staffing Must Retain Counsel

Sync Staffing filed its motion to dismiss through counsel but that counsel subsequently moved to withdraw. (Doc. 49). In granting that request, the Court ordered Sync Staffing to obtain new counsel and have that counsel file a notice of appearance by December 5, 2016. (Doc. 50). Sync Staffing did not do so. As mentioned in the previous order, Sync Staffing's failure to appear through counsel may lead to entry of default judgment. (Doc. 50).

Accordingly,

IT IS ORDERED the Motion to Dismiss (Doc. 47) is **GRANTED** to the extent the cross-claims are DISMISSED. The request for entry of a Rule 54(b) judgment is **DENIED**.

IT IS FURTHER ORDERED Sync Staffing shall obtain counsel and file a notice of appearance within ten days of this order.

IT IS FURTHER ORDERED at the scheduling conference, the parties shall be prepared to discuss whether Sync Staffing's refusal to participate in this case through counsel will impact liability, in particular the fact of joint and several liability amongst all defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Thomas E PEREZ, Plaintiff,
v.
TBG LOGISTICS LLC, et al., Defendants.

No. CV-16-02916-PHX-ROS

ORDER

The group of defendants referred to as "ESSG" has moved for leave to file a third-party complaint against Albertsons Companies, LLC, and Albertson's, LLC (collectively, "Albertson's"). ESSG admits this request is foreclosed by the Court's prior order granting a motion to dismiss. (Doc. 61). Thus, ESSG's motion seeks reconsideration of that order. ESSG's arguments for reconsideration, however, are not new and the Court considered them in issuing the prior order. Accordingly, the motion for leave to file a third-party complaint and for reconsideration will be denied.

Anticipating this conclusion, ESSG requests the Court allow it "to join Albertsons to this action as a third-party defendant, and certify[] this matter under FRCP 54(b) for interlocutory appeal." (Doc. 82 at 4). It is not clear what ESSG means by this request. If Albertson's were joined as a third-party defendant, there would be no "final judgment" sufficient to trigger Federal Rule of Civil Procedure 54(b). Assuming ESSG is requesting the Court certify this order under 28 U.S.C. § 1292(b), ESSG has not made the requisite showing. ESSG cannot meet at least two of the three requirements for an interlocutory appeal. See *Couch v.*

Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010) ("Certification under § 1292(b) requires the district court to expressly find in writing that all three § 1292(b) requirements are met."). ESSG has not shown a "substantial ground for difference of opinion" exists nor has it established that "an immediate appeal . . . may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The request for either a Rule 54(b) judgment or certification for interlocutory appeal will be denied.

Accordingly,

IT IS ORDERED the Motion for Leave to File Third Party Complaint and Motion for Reconsideration (Doc. 68) is DENIED.

Dated this 27th day of March, 2017.

Honorable Roslyn O. Silver, Senior United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

R. Alexander Acosta, Secretary of Labor,

Plaintiff,

v.

TBG Logistics, LLC, et al.,

Defendants.

No. 2:16-cv-02916-ROS

DECLARATION OF MICHAELA HALPUTZOK IN SUPPORT OF DEFENDANTS EMPLOYER SOLUTIONS STAFFING GROUP, LLC, EMPLOYER SOLUTIONS STAFFING GROUP II, LLC, EMPLOYER SOLUTIONS STAFFING GROUP III, LLC, AND EMPLOYER SOLUTIONS STAFFING GROUP IV, LLC, IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I, Michaela Halputzok, declare and certify that:

1. I am an adult resident of the state of Minnesota.

2. I currently am a Payroll Integration Coordinator at Employer Solutions Staffing Group, LLC, Employer Solutions Staffing Group II, LLC, Employer Solutions Staffing Group III, LLC and Employer Solutions Staffing Group IV, LLC (hereafter "ESSG").

3. I am making this Declaration in support of **DEFENDANTS EMPLOYER SOLUTIONS**

STAFFING GROUP, LLC, EMPLOYER SOLUTIONS STAFFING GROUP II, LLC, EMPLOYER SOLUTIONS STAFFING GROUP III, LLC, AND EMPLOYER SOLUTIONS STAFFING GROUP IV, and LLC, IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

4. I was hired in August of 2012 by ESSG as an entry level payroll processor.

5. From August 2012 through July 2015 I was a payroll processor for ESSG.

6. In November 2012, I was assigned my first payrolls to process independently. Among these first payrolls was an account for TBG Logistics, a new client of ESSG.

7. I received the first hours worked for employees assigned at TBG Logistics on November 12, 2012 from Jessica Stokham, a contact at Ascend Staffing.

8. I processed all hours for this first payroll batch paying regular wages for hours up to 40, and an overtime premium of 1.5 times regular wage for hours over 40 for each individual ESSG employee assigned to TBG Logistics.

9. I emailed over to Jessica Stokham at Ascend a payroll proof showing what hours would be payed to the ESSG employees before finalizing the payroll and issuing the checks.

10. Jessica called me on the telephone and told me she would not approve the payroll proof showing overtime wages. Instead, she directed me to process the

payroll with hours paid as listed on the spreadsheet sent by TBG. This TBG spreadsheet showed overtime for few employees, but for most all the hours worked, even those in excess of 40 hours for the workweek, were shown as straight time regular wage hours with no overtime premium.

11. I did not receive details but I believed there must be an exception for why the payroll would be processed in that manner and not include overtime hours.

12. I did not have any discussion with Doyle Piper, my supervisor at the time, or with any manager or owner at ESSG as to whether I was approved to process the payroll in the manner requested by Jessica Stokham at Ascend.

13. I continued processing the TBG Logistics payroll in this manner for the entire period in question.

14. I recall that at some later time I spoke with Ross Plaetzer, Client Services Director for ESSG, regarding overtime relating to employees recruited through Sync Staffing.

15. I do not recall the date or the specific subject matter regarding this conversation.

16. To the best of my recollection, I believe this discussion occurred after we received a company-wide email affirming that all hours over 40 in a work week were to be paid at the appropriate overtime premium rate. I do not recall the specifics of this email, but believe it was sent out by Ross Plaetzer.

17. I recall there being a potential exception to overtime requirements as I understood them potentially due to the type of work being performed by employees at TBG Logistics.

18. At no time during the relevant time frame did I have any understanding of what type of work ESSG employees were, in fact, performing at TBG Logistics.

19. If I have any questions about payroll processing, I have always been instructed to seek guidance from a payroll team manager or supervisor.

20. I did have some conversations with Joe Rodriguez of Sync Staffing regarding overtime requirements, specifically weighted average when an ESSG employee works at more than one site location during the work week.

21. I informed Mr. Rodriguez at that time that if any ESSG employee works over 40 hours, they must be paid an overtime premium. I instructed him that we would not be allowed to process any hours over 40 at a regular rate for any such ESSG employees.

22. During the time I was processing the payroll for TBG Logistics, I did not believe I was in any violation of the Fair Labor Standards Act or any other wage law.

23. During the time I was processing the payroll for TBG Logistics, I have no recollection of any conversations with Matt Connors at TBG Logistics in which I agreed not to pay overtime wages.

24. I first became aware of potential issues with this payroll in early 2016 when I learned the

Department of Labor was requesting records relating to TBG Logistics.

25. At that time, I had already been promoted to Lead Payroll Account Manager.

26. I was promoted to Lead Payroll Account Manager in July 2015, a year after I ceased work on the TBG Logistics account. This position required me to fill in for other payroll processing employees who were out of the office, but did not result in my oversight of other employees or give me decision-making authority.

27. On July 23, 2014, I did send an email to a colleague, Rebekah Scherer, also an entry level payroll processor, regarding dismissal of overtime alerts for TBG Logistics on the payroll software system. The TBG Logistics payroll was among a number that would be transitioning from me to Ms. Scherer at that time.

28. I was not Ms. Scherer's manager or supervisor at any time.

29. To my knowledge, Ms. Scherer never processed any payroll for TBG Logistics due to the relationship ending with Sync Staffing and TBG Logistics around July 27, 2014.

30. During the period in which I processed payroll for ESSG employees assigned to TBG Logistics, I did not receive any calls or complaints from employees claiming they were being paid incorrectly or at an improper wage rate.

31. Our payroll processing software did provide an alert message when more than 40 hours were being processed as regular pay. I did not show this alert to my

supervisor, manager, or any owner of ESSG during the time in which it appeared on my screen.

Pursuant to 28 U.S. Code § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Executed on December 15, 2017.

/s/ Michaela Haluptzok

Michaela Haluptzok (Signature)

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

R. Alexander Acosta, Secretary of Labor,

Plaintiff,

v.

TBG Logistics, LLC, et al.,

Defendants.

No. 2:16-cv-02916-ROS

DECLARATION OF CHRISTOPHER LEVINE IN SUPPORT OF DEFENDANTS EMPLOYER SOLUTIONS STAFFING GROUP, LLC, EMPLOYER SOLUTIONS STAFFING GROUP II, LLC, EMPLOYER SOLUTIONS STAFFING GROUP III, LLC, AND EMPLOYER SOLUTIONS STAFFING GROUP IV, LLC, IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I, Christopher Levine, declare and certify that:

1. I am an adult resident of the state of Minnesota.

2. I am the CEO of Employer Solutions Staffing Group, LLC, Employer Solutions Staffing Group II, LLC, Employer Solutions Staffing Group III, LLC and Employer Solutions Staffing Group IV, LLC (hereafter "ESSG").

3. I am making this Declaration in support of **DEFENDANTS EMPLOYER SOLUTIONS**

STAFFING GROUP, LLC, EMPLOYER SOLUTIONS STAFFING GROUP II, LLC, EMPLOYER SOLUTIONS STAFFING GROUP III, LLC, AND EMPLOYER SOLUTIONS STAFFING GROUP IV, and LLC, IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

4. At all times relevant to this matter, I was the CEO of ESSG.

5. I was involved in the process of obtaining the staffing contract for TBG Logistics to become a client of ESSG in 2012.

6. As part of that process, ESSG retained Sync Staffing to in order to recruit and facilitate placement of temporary employees into the assignment at TBG Logistics.

7. During this process, I had no conversations with Joe Rodriguez of Sync Staffing or Matt Connors of TBG Logistics regarding any agreement to not pay overtime for hours worked over 40 hours in a work week by ESSG employees assigned to the TBG worksite. Subsequently, I had no additional conversations with either of these men regarding overtime during the period in question.

8. I was not aware of any violations of any federal overtime rule on this account during the timeframe in which the payroll was being processed.

9. I had no conversations with Michaela Haluptzok, the ESSG payroll processor assigned to this account, regarding overtime.

10. I gave no approval, verbal or otherwise, to disregard federal overtime rules for any ESSG employees assigned at TBG Logistics.

11. I became aware of the overtime violations at TBG Logistics after being notified that the Department of Labor was requesting records relating to employees in December 2015.

12. After being notified of the Department of Labor investigation, in early 2016, I oversaw a complete audit of ESSG's payroll history nationwide. Through this audit, no additional violations of FLSA standards were found or identified by any payroll processor on any account at any time.

13. As a pattern of regular business practice, I regularly provided guidance companywide that directed payroll processors to always follow any applicable overtime law or rule.

14. I am aware that our payroll software system does provide an alert showing when there is a potential error with regard to overtime wages.

15. At no time did I ever provide direction or authorization to any employee to dismiss these alerts.

16. To my knowledge, there is no process that allows me to see or become aware of when an employee dismisses an alert.

17. There is no log available on the payroll software system to show a record of alerts that have been dismissed by any employees.

18. Prior to being notified of the Department of Labor investigation, I did not have any conversations

with Michaela Haluptzok regarding her decision to dismiss the overtime alert for the ESSG employees assigned to TBG Logistics.

19. As a result of not paying and billing the overtime rate for the involved employees assigned to work at TBG, ESSG lost approximately $31,408.31 in revenue during the relevant time period.

20. During this time frame, the ESSG processed 317,497 payroll transactions nationwide. I do not personally review each and every transaction. The transactions with unpaid overtime in this case total 1,103, which is 0.35% of the payroll transactions.

21. In 2013 ESSG issued 57,978 W2s nationwide and in 2014 issued 60,776 W2s nationwide.

22. Payroll administrators are provided with training and direction and then directed to process their assigned payrolls on a weekly basis, with the understanding that they will seek guidance and direction from a supervisor on an as needed basis.

23. In approximately June 2015 payroll processors were given a title change to Payroll Account Manager. This title change did not result in any change of duties. Payroll Account Managers do not oversee other employees and do not hold any decision making or supervisory authority.

24. The Outsource Agreement between ESSG and Sync Staffing sets out responsibilities of each party. A true and correct copy of this agreement is attached as Exhibit 1.

Pursuant to 28 U.S. Code § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Executed on December 15, 2017.

/s/ Christopher Levine

Christopher Levine (Signature)